LOS ANGELES BAR BULLETIN

In This Issue

Are attorneys entitled to act in disorderly manner before Congressional Committees?
—See President W. I. Gilbert, Jr.'s Reply to State Bar.....page 315

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Los Angeles
BAR BULLETIN

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VOL. 28 JUNE, 1953 No. 9

"In 'Defense' of Discipline"

By W. I. Gilbert, Jr.
President, Los Angeles Bar Association

W. I. Gilbert, Jr.

IN the current (March-April) State Bar Journal, and in the May 25, 1953 issue of the Daily Journal, the unsuccessful efforts of your Board of Trustees to amend Section 6068 of the Business and Professions Code is discussed. The amendment sought would provide for disciplinary action against attorneys who are disorderly in hearings, and who now are beyond control.

After Frank Belcher, Burdette Daniels and I met with the Board of Governors, and later learned the Board voted for "no action," the Trustees debated whether or not the matter should be publicized. We decided not, since publicized strife would likely only add to the harm done by a few lawyers who had appeared before Congressional sub-committees.

DO NOT DO JUSTICE

However, the above articles do not seem to do complete justice to the position of the Los Angeles Bar Association or the work of its Committee. In both articles it is stated that "there is adequate machinery for punishment of contemptuous conduct" on the Congressional committee level, and "those violations are being heard by the courts" (Daily Journal); or, "Even on the level of Congressional committees, some of the Board members felt that either there is now adequate machinery for punishing contemptuous conduct, or if not *that the existing machinery should be strengthened,*

and that avenue followed if flagrantly disrespectful conduct is engaged in by lawyers or anyone else."

The above italics are added because the portion italicized is *exactly* what the Los Angeles Bar is attempting to do—"strengthen existing machinery," if any there is.

The Board cites no authority for its (or some of its members) view that "there is now adequate machinery for punishing contemptuous conduct."

Your committee—the Belcher Committee—researched this problem, and came to the conclusion that no such power exists (See 4 Baylor Law Review 29-54; 1951; 32 Boston University Law Review 326). The research is too long to set out here, but the Baylor Law Review, while stating that Congress has power of punishment for contempt, points out that this apparently does *not* include "protection of its dignity." (See also Marshall v. Gordon 243 US 521; 616 Ed. 881.)

CALIFORNIA SHOULD CONTROL ITS ATTORNEYS

Furthermore, it seems to us a false premise to say, in effect, that, "Some one else can punish therefore we should not." If such were a sound premise then all State Bar disciplinary power ought to be revoked on the theory that the District Attorney can punish the lawyer who misappropriates his client's funds. We maintain it is better that California retain control over its own than to abandon the fate of its lawyers to a hearing in Washington, D. C.

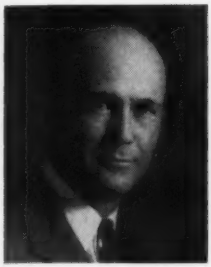
The Board states, "That a lawyer appearing before a city planning commission, or a deputy in some branch of state or local government should not be under threat of the filing of a disciplinary complaint against him—if in the heat of discussion he said or did something which seemed to him necessary to the protection of his client's rights, but which the lay official resented." (State Bar Journal.)

We pointed out that lawyers daily are confronted with this hazard; that the enforcement of the rule would be with the Board of Governors itself and that the Bar has, and the Board should have, confidence that the Board would not abuse this disciplinary power; that any lawyer's conduct will be appraised in the light of its setting, and if the lawyer is provoked by some lay official his response would be measured by the provocation; but that

(Continued on page 338)

EYEING THE EVIDENCE

John L. Harris*
Examiner of Questioned Documents



John L. Harris

WHAT physical facts can be proven about a disputed document? Of course we first think of the signature, is it genuine? But a lawyer's scientific imagination should take him far beyond this preliminary consideration. Scores of fraudulent instruments have been written in above a genuine signature. Sometimes it is worth while to turn a document upside down, sit back, and ask yourself questions such as these: Did the same person do all the writing? Do the stains and folds have any significance? Was it all typed at one time? Could a page have been substituted? What was erased? Why is one edge of the paper uneven? How old is the paper and typewriting? Why were different colored inks used? Question after question can be asked about the origin, age and history of a document, but it may take only one answer to prove the facts.

Probably the most effective method of suggesting why some documents should be investigated before taking them seriously is to briefly review a few actual Court cases which demonstrate different types of document problems.

ACTUAL COURT CASES

In a very recent case a decedent who had resided in Los Angeles left the bulk of a $200,000 estate consisting of Montana oil land to his son, with a provision in the will for the daughter to be paid $1,000 a year. No document ever appeared to be more genuine. The will consisted of four typewritten pages, initialed on each page and signed by the father, dated and had the usual attestation clause with signatures of two reputable witnesses. Obviously, the will had been drawn by a lawyer because of its

*Mr. Harris has specialized in the examination of questioned documents for over 25 years and is President of the American Society of Questioned Document Examiners. He is associated with his son, John J. Harris in the firm of Harris & Harris located at 453 So Spring St., Los Angeles. Mr. Harris has testified in many outstanding civil and criminal cases in California and other states. For the past 15 years he has conducted classes on the subject of forgery detection at the University of Southern California.

legal aspects, and, furthermore, the provisions appeared to conform with the testator's intentions in regard to the disposition of his property. Only one loophole encouraged the daughter to doubt the genuineness of this will—her brother had filed the document for probate in Montana three months after the father's death.

An expert examination of this will in a tiny court house near the Canadian border resulted in an opinion that the alleged signature and initials of the testator were clever forgeries. The father evidently had consulted a lawyer and was tendered a draft of his proposed will, which he took home for study but never executed.

A contest was filed and soon thereafter, by consent of both parties and approval of the Court, the will was withdrawn on legal grounds that an out of state witness to a will under Montana law must attest to the signing of the will by deposition, rather than affidavit which had been done. As an heir at law the daughter won her fight for a substantial interest in a sizeable estate.

This case illustrates the fact that a document isn't necessarily genuine even though it may appear to have been prepared by a lawyer, and may have an appearance of authenticity.

How could a document be counterfeit, when it bears a genuine signature? In re: *Estate of Esther Horowitz* a vertical fold down the center of the paper proved a will to be fraudulent. A nephew testified he wrote the will and that Mrs. Horowitz signed it immediately thereafter. Two witnesses testified that they signed right after Mrs. Horowitz, and in her presence.

However, this will was set aside on grounds that the testator's genuine signature was originally written on a blank piece of paper and that the nephew had filled in the body of the will at a later time. Ink writing passing over a fold bleeds into the fold of the paper. All 43 lines of handwriting by the nephew intersected the fold in the center of the paper and dispersed, proving that his writing was done after the fold. But Esther Horowitz's signature passed over the fold without interruption, proving it was on the paper before it was creased, or contained any other writing.

ATTEMPTED TO DESTROY EVIDENCE

Harry Horowitz, the nephew, who was the proponent of the will, was later convicted on four counts in connection with this will. One count was brought about when he visited the County

(Continued on page 339)

Chief Judge Yankwich Addresses New Lawyers

(Remarks on Admission of Group to the Bar, Wednesday, Jan. 29, 1953)

By Leon R. Yankwich, J.D., LL.D.
Chief Judge, U. S. District Court

Leon R. Yankwich,
Chief Judge,
U.S. District Court

IN Poor Richard's Almanack is found the following ditty:

God works wonders now and then;
Behold! a lawyer, an honest man.

This is an American variant of the famous chant which, at the annual celebration held in his native village every year for the patron saint of lawyers, Saint Ives of Brittany,—the villagers sing,

"Advocatus sed no latro
Res miranda populo."
(An advocate yet not a thief
A thing well nigh beyond belief.)

Throughout the ages, because lawyers have had to espouse the cause of others and make their client's cause their own, the average person has sought to charge the lawyer with the faults and delinquencies of the client he represented. Those who understand the true nature of advocacy realize that, whether we are dealing with a civil or criminal case, the defense of a client's position *does not* imply responsibility of the client's conduct.

A story is told of Sir Edward Marshall Hall, one of the great English trial lawyers of the early part of this century. After he had secured the acquittal of his client by a Judge, the client said to him, "I told you I was innocent and now you have proved it." Sir Edward rather sharply answered, "I have proved nothing of the kind. I have only induced the bench to say you were not proved guilty." And he rejected his client's proffered handshake by saying, "No, that is not included in the etiquette of the Bar or in the brief-fee." (Cited in editorial in American Bar Association Journal, Volume 39, No. 1, January 1953, page 45.)

For this reason, as I have had occasion to say in the past, the Code of Ethics of the attorneys do not allow them to reject, for *personal considerations*, the cause of one accused of a public offense (California Business and Professions Code, Sec. 6068(h)).

This limitation applies to criminal cases only. It has a more limited application to civil cases. The California Code enumerates among the duties of the attorney, the following:

> "To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense." (California Business and Professions Code, Sec. 6068(c)).

CAUSE MUST APPEAR JUST OR LEGAL

You will note that the code does not say that the causes *shall be* legal or just. It merely says they *shall appear* to the lawyer to be legal or just. Law, according to an ancient maxim, is "the technique of justice or of equity." But law is not an abstraction. It is a product of human society. It, therefore, has limitations.

Many of the limitations arise from the fact that under our system, justice is not a matter of grace, but a matter of right. We do not dispense justice by the grace of some higher power, but under the law. For this reason, the arbitrary justice of the Oriental Cadhi might achieve better results in a particular case than justice administered by courts bound by the rule of law.

The lawyer's Code of Ethics takes this into consideration. A case may appear legal or just to a lawyer, which may not be so considered by the Judge or jury trying the case. The client is notoriously a partisan. Consciously or unconsciously, his view of the facts is biased.

There are many instances in which the lawyer is the last person to know the truth. Clients have been known to shop and when told by one lawyer that certain things were wrong with a case, did not hesitate to supply them when consulting another lawyer. Again, the lawyer may be mistaken as to the legal implications of the facts. Indeed, from a Judge's standpoint, fifty per cent of the lawyers are wrong, because there always is a loser in every law suit. And no Judge will admit that the loser *could* possibly be right.

So the duty of the lawyer is to familiarize himself thoroughly with the law of the case, and to scrutinize, as much as he can, the facts which are presented to him, in order to avoid surprises. This does not mean that surprises will not happen, that either on cross-examination or by other testimony, some facts may not be produced which may knock your whole case "into a cocked hat." When this happens and you have taken the proper precaution to

(Continued on page 343)

The Award of Property by Interlocutory Decree of Divorce

By JUDGE LOUIS H. BURKE*

Judge Louis H. Burke

IN the April, 1953, issue of the Los Angeles Bar Journal an article appeared suggesting a method whereby a marketable title to property can be obtained through a present, final award thereof in an interlocutory decree of divorce. The writer first referred to the case of *Leupe vs. Leupe,* 21 Cal. 2d, 145, holding that a court has jurisdiction to make an unqualified disposition of property in an interlocutory decree of divorce and that when the time for appeal therefrom has expired the determination of property issues in the interlocutory decree becomes final.

The writer then turned to the more recent case of *Johnston vs. Johnston,* 106 Cal. App. 2d, 775, (hearing in Supreme Court denied December 13, 1951) wherein the court reiterated the well-established rule that the final division of community property should be made in the final decree of divorce. In this case, the writer points out, the court held that language in an interlocutory decree purporting to make a present, final disposition of community property will be considered in conjunction with the remainder of the decree and that (page 781) "If the decree includes a provision for the granting of further relief at the time of entry of the final decree of divorce, similar to the italicized provisions in the interlocutory decree set forth supra, the interlocutory decree will be construed as determining the manner in which the community property is to be assigned at the time of entry of the final decree. The language in the interlocutory decree purporting to make a final disposition of the community property will be disregarded as surplusage." (Citing *Webster vs. Webster,* 216 Cal. 485, 493, and *Lo Vasco vs. Lo Vasco,* 46 Cal. App. 2d, 242, 247.) The provision for the granting of further relief, referred to by

*Judge of the Superior Court of Los Angeles County.

the court, is the language contained in the printed form of the interlocutory decree utilized in Los Angeles County, the pertinent part of which provides that when "one year shall have expired after the entry of this interlocutory judgment a final judgment dissolving the marriage between the cross-complainant and cross-defendant be entered and at that time the court *shall grant such other and further relief as may be necessary to complete the disposition of this action - - -.*"

In the article referred to above, the writer suggests that in any case in which a marketable title to property is desired at the time of the interlocutory decree it is "very important to avoid the use in the interlocutory decree of language retaining jurisdiction for the granting of other and further relief at the time of entering the final judgment of divorce. Careful draftsmanship can avoid the rule of the Johnston case and provide a marketable title under the rule of the Leupe case." In considering this suggestion, however, it should be pointed out that the above-quoted language of the standard form of interlocutory decree in use in Los Angeles County constitutes a portion of Civil Code section 132, which reads as follows: "When one year has expired after the entry of such interlocutory judgment, the court - - -, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; *and such other and further relief as may be necessary to complete the disposition of the action, - - -.*" Thus, the question should be posed—Can the court, by the omission of the underscored language in the interlocutory decree, deprive itself of its statutory power to grant such other and further relief as may be necessary to complete disposition of the action at the time of the entry of the final judgment of divorce? Is not the legal effect exactly the same whether or not the court incorporates in the decree the language of the Code?

It would appear that the Johnston case may well be one step on the judicial road back to the rules laid down in *Remley vs. Remley*, 49 Cal. App. 489, and *Strupelle vs. Strupelle*, 59 Cal. App. 526, cited with approval in many subsequent decisions of our higher courts; that the trial court, at the time of rendition of its interlocutory judgment, should determine the status of the property and how such property ought to be assigned just as it

(Continued on page 349)

Tax Hazards in Hidden Powers of Appointment

By Leon B. Brown
of the Los Angeles Bar

Experience teaches us that it is impossible to devise any rigid plan for the devolution of property from one generation to another which will operate with complete equity under all circumstances. Some flexibility is desirable, so that plans made today can be altered in the light of future events. Because such flexibility can only be attained by the use of powers of appointment, Prof. Leach of the Harvard Low School once described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." (24 Am. Bar Assn. Journal, p. 807.) This high tribute is no less justified by the fact that the use of powers of appointment may involve tax consequences, so long as they are recognized and provided for. The problem of recognition, however, is not as easy as it once was.

Let us take, as a familiar example, the testamentary trust to pay income to the widow for life. Prior to 1942 no one would have contended that the widow held a power of appointment, merely because the trust gave her the right to invade or consume the corpus during her life. The Restatement of the Law of Property, Sec. 318, after defining powers of appointment, expressly states that the definition does not include a power to invade principal. (See Comment j). In 1942, however, when Congress amended Section 811(f) of the Internal Revenue Code to make the mere possession of a power of appointment taxable, the committee reports declared that the term included "all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and local property law connotations." The following year the Commissioner, in his amended regulations (Reg. 105, Sec. 81.24(b)(1)), after repeating the language of the committee reports, said: "For example, if a settlor transfers property in trust for the life of his wife, with a power in his wife to appropriate or consume the principal of the trust, the wife has a power of appointment." The regulations went on to declare that a beneficiary's power to alter, amend, revoke or terminate the trust with the consent of the trustee was

also a power of appointment, but charitably conceded that *ordinarily* powers of management were not.

On June 28, 1951 Congress enacted what is known as The Powers of Appointment Act of 1951 (P.L. 58, amending Code Secs. 811(f) and 1000(c)), the beneficent purpose of which, as stated in the Senate Finance Committee report, was "to make the law simple and definite enough to be understood and applied by the average lawyer." In some respects the Act does make the law more certain, but at the same time it so broadens the primary definition of a taxable power of appointment as to give rise to many new problems. No longer, as under the 1942 Act, need a power of appointment be a "power to appoint." It need only be a "power," provided it is exercisable in favor of its possessor, his creditors, his estate, or the creditors of his estate. There is as yet no indication from the Commissioner as to the scope he will attempt to give to this broadened definition. At the time of this writing, almost two years after the enactment of the statute, the Commissioner has not even proposed interpretive regulations.

POWER OF INVASION SAME AS POWER OF APPOINTMENT

Certain it is that powers of invasion are now definitely treated as powers of appointment. The Committee report says so. Possibly also the new definition is intended to ratify the Commissioner's contention that certain statutory powers are powers of appointment. This contention was first made in T.D. 5699, published May 13, 1949, which amended the regulation to add the following language:

> "To take another example of the scope of the term 'power of appointment,' assume that the community property laws of a State confer upon the wife a power of testamentary disposition over property in which she does not have a vested interest. Subject to the exceptions stated in (2) and (3) hereunder, such a power is a power of appointment and the property subject thereto is includible in the wife's gross estate."

Except in the special case covered by Sec. 811(f)(4), which probably can arise only under the laws of Delaware, the 1951 Act attaches tax consequences only to the possession, exercise or release of a *general* power of appointment—that is, one exercisable in favor of the possessor, his estate, or creditors. A power given

(Continued on page 352)

Opinion of Committee on Legal Ethics Los Angeles Bar Association

OPINION No. 204
(February 4, 1953)

DIVISION OF FEES ON REFERENCE.

An Attorney May Receive Portion of Fee Paid to Another Attorney Selected or Retained by Him on Behalf of His Client Where He Performs Services or Assumes Responsibility With Reference to the Work Done by the Second Attorney.

A's CLIENT needs the services of a attorney specializing in a certain field. A consults a fellow lawyer specialist B. B advises A that if retained he will pay A 1/3 of any fee received from A's client. A introduces the client to B at the latter's office, spending one hour with both discussing the case. B accepts the employment and on own initiative sets a fee agreeable to both A and the client. A's client later pays $1000 on account. B then calls A advising him that the case involves more work than he originally anticipated when he agreed to pay A 1/3 of the fee. At B's request, A then agrees to accept 20%. B pays A $200; later, however, when A's client pays B the balance of the fee amounting to $4000, B refuses to pay A anything more on the ground that the time and effort expended by B was too great to justify B's paying any additional sum to A.

Question No. 1—Is B's agreement to pay A a "forwarding or reference fee" (Quotation from letter of inquiry) a violation of the Canons of Ethics?

Canon 34 states:

> "No division of fees for legal services is proper, except with another lawyer, based upon a division of *service* or *responsibility*." (Emphasis added.)

The key, therefore, to the problem of whether a division of fees is proper under the Canons of Legal Ethics is to be found in the expression "a division of service or responsibility." Where there has been a division of either service or responsibility a division of fees is ethical. If, however, there be no division of service or responsibility, a division of fees simply on a forwarding or reference basis violates Canon 34. (A.B.A. Opinion 204.)

The question here then is whether there was a division of service or responsibility as between A and B.

No service is rendered or responsibility incurred within the meaning of Canon 34 where one lawyer recommends another lawyer to his client. Hence "forwarding" or "reference" fees as such are unethical. (A.B.A. Opinion 97.)

What amounts to "service or responsibility" must be determined by the facts of each case. In Opinion 204 *supra* it is stated:

> "The extent of the service rendered, if any, or of the responsibility, if any, incurred or assumed by a lawyer in retaining another may vary in particular cases, depending, in no small degree, upon whether the client was advised that other counsel should be retained, whether the retainer or selection, was made with or without the client's request or approval, and whether supervision or control was reserved or maintained as to the acts or conduct of the retained lawyer—and by whom. The implications of these elements are obvious and may determine the existence and measure, or nonexistence, of responsibility within the meaning of Canon 34."

In the case here presented to the Committee, attorney A did procure the services of specialist B for and with the knowledge and consent of his client. Further A discussed the case with B and the client. As to whether A's conduct constituted "services" to the client, the Committee cites Opinion 204 which reads as follows:

> "It is assumed that the Bar, generally, understands what acts or conduct of a lawyer may constitute 'services' to a client within the intendment of Canon 12. Such acts or conduct invariably, if not always, involve 'responsibility' on the part of the lawyer, whether the word 'responsibility' be construed to denote the possible resultant legal or moral liability on the part of the lawyer to the client or to others, or the onus of deciding what should or should not be done in behalf of the client. The word 'services' in Canon 12 must be construed in this broad sense and may apply to the slection and retainer of associate counsel as well as to other acts or conduct in the client's behalf."

If A maintained supervision or control over B, then under Opinion 204, *supra*. A did render a service and did assume responsibility. It cannot be determined on the basis of the facts stated, however, whether the elements of supervision or control are present here.

Once it is determined that a lawyer has rendered "service" or assumed "responsibility" to his client in connection with a reference situation, this Committee will neither measure the service rendered nor the responsibility assumed by the respective lawyers who may become so associated. (Opinion 204.)

(Continued on page 354)

Los Angeles Bar Association Delegates and Alternates to the 1953 Conference

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of of June, 1928, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

THE Los Angeles Bar Association is being urged to name a committee to work with the Board of Supervisors on the new court house plan. The project provides for a $5,500,000 height-limit structure between Broadway and Hill from First to Temple Streets. The proposed building will house the County Counsel, Board of Supervisors, law library, grand jury and 60 courts.

* * *

Fifty-nine new attorneys are being admitted to practice in California before the Supreme Court sitting in Los Angeles. Among the new members of the bar are **Silas Ernest Roll, Edwin F. Hahn Jr., Herbert F. Sturdy, A. George Bouchard** and **Walter L. Nossaman.**

* * *

The U. S. Supreme Court in a 5 to 4 decision in the "Olmstead Case" holds that evidence obtained by "wire tapping" is admissible in a criminal case arising under the prohibition law, and that a conviction obtained by such means is not in violation of the constitutional guarantees against search and seizure.

* * *

The Republican National Convention opens at Kansas City, Missouri. The "keynote" address is made by U. S. Senator **Simeon D. Fess** of Ohio, the Temporary Chairman. The Permanent Chairman selected is U. S. Senator **George H. Moses** of New Hampshire. On the first ballot U. S. Secretary of Commerce **Herbert Hoover** is nominated for the Presidency. The voting is Hoover, 837; Curtis, 64; Watson, 45; Goff, 18; Norris, 34; Coolidge, 17; Lowden, 66; and Dawes 3. U. S. Senator **Charles Curtis**

of Kansas is nominated on the first ballot for the Vice-Presidency.

* * *

Coincident with its thirty-fifth year in the field of title insurance, escrows and trusts, Title Insurance and Trust Company this month is opening its new $4,000,000 home office at 433 South Spring Street.

* * *

Complaints have been filed with the State Bar Board of Governors that several Los Angeles attorneys are violating the bar regulations by advertising to the public that "domestic relations cases will be handled for as low a fee as $12."

* * *

An opinion delivered by Lord Justice Scrutton in London on beauticians says "These specialists trade on the very large number of people who have plenty of money and no brains, and who are ready to spend that money in attempting to improve their faces that providence has given them."

* * *

The Chinese Nationalist Government Political Council has decided to change the name of the Manchu Capital, Peking, to Peiping, meaning "Northern Peace."

* * *

The State Bar is considering the elimination of recognition of correspondence-school courses in law in the new Admission to Practice rules soon to be submitted to the Supreme Court for ratification. The new proposals are being prepared by Vice-Chairman **John E. Biby** of the Committee of Bar Examiners. Among the other members of the committee are **O. K. Cushing, James B. Scarborough, Jesse W. Carter, Delger Trowbridge** and **George J. Stoneman.**

* * *

The legal question is before Judge **Wm. T. Aggeler** for ruling whether possessing a still used to manufacture alcohol used externally, and not for beverage purposes, violates the Wright Act. Counsel contends that his client, who has been suffering with rheumatism and making alcohol to rub on his arms and legs for relief, does not violate the "possession of a still" clause.

* * *

Judge **Edwin F. Hahn** is elected Presiding Judge of the Los

(Continued on page 333)

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

THE College of Law of the State University of **Iowa** has published and is distributing to farmers and lawyers in that state two bulletins, one entitled "Transferring Farm Property Within Families in Iowa" and the other, "Improving Farm Rental Arrangements in Iowa." The purpose, according to the sponsoring law school, is "to further the cooperation between lawyers and farmers in the interest of the legal profession and the stability of our farm economy."

* * *

A new course in Office Management and Professional Responsibility is now offered at the University of **Washington** Law School. It will include discussions of legal ethics, unauthorized practice, relations with other lawyers and judges, how to keep clients, and office reception practices. Members of the Seattle bar will assist the Faculty of the Law School in giving the course.

* * *

The bar of **Seattle** recently turned out in force to honor Paul P. O'Brien, clerk of the U. S. Court of Appeals for the Ninth Circuit, who has completed 50 years of service in the clerk's office.

* * *

The **Wisconsin** Bar Association has published a pamphlet honoring the one hundredth anniversary of the organization of the Supreme Court of that state and has supplied thousands of them to high school seniors throughout that state. It traces the history and development of the Court and describes its work and its method of operation. While written primarily for young people it contains a good deal of information of interest to members of the bar.

* * *

Some months ago we reprinted a notice from *Dicta*, publication of the **Colorado** Bar Association, to the effect that Paonia, together with the entire northern portion of Delta County, in that state, was in need of a lawyer. Along with it we ran some touching

lines about Paonia's plight which our old friend, B. Nonymous, had strung together. A recent number of *Dicta* has in turn reprinted our item in full, with this postscript:

> *"Note to Mr. B. Nonymous:* The editor of *Dicta* is happy to report that the crisis in Paonia is passed and that one full time and one part time lawyer are now serving her needs. Your deep concern for Paonia's plight is appreciated by the Bar of Colorado and the people of Delta County."

* * *

The Committee on Public Information of the State Bar of **South Dakota** has prepared and is distributing pamphlets on "Jury Duty" and "Joint Tenancy."

* * *

The minimum fee schedule of the State Bar of **South Dakota**, adopted in 1949, has been increased 25 per cent across the board.

* * *

"The County Clerk has established a card file of unusual pleadings. This index is available to all attorneys wishing to avail themselves of same when they have an unordinary or seldom filed cause of action." *Dicta,* Newsletter for Attorneys of **San Diego County.**

* * *

REQUISITES OF A LAWYER

The three main requisites of a lawyer are learning, diligence and integrity; but the greatest of these is integrity. In re Duncan 64 S.C. 461, 42 S.E. 433.

* * *

The Boulder County Bar Association and the University of **Colorado** School of Law recently held their annual Law Day. The subject chosen for this year's program was "Pitfalls in Probate and Trust Practice."

* * *

A combination of pre-trial procedure, conciliation and marriage counseling, initiated in the **Cleveland** Court of Common Pleas, has reduced the backlog of its divorce docket from a delay of almost 30 months to a little more than 10. Nearly 2,000 divorce cases were disposed of in the first nine weeks of the new system, which was started about the first of the year, and more than half of these ended in reconciliations.

* * *

(Continued on page 335)

SILVER MEMORIES

(Continued from page 330)

Angeles Superior Court to succeed Judge **Victor R. McLucas** on July first. Judge Hahn is stepping in at a time when the presiding judge must maintain if not improve the high state of efficiency recently prevailing. Retiring Judge McLucas has seen the court through a period of "efficiency progress" that brought an almost chaotic condition into order. The retiring judge is stepping out with the calendar calling for all hearings within 90 days of filing (instead of 9 months) and a program for handling the volume of work with only 45 judges.

* * *

Secretary of State **Frank Kellogg** has made public the draft of a treaty for the outlawing of war, also his note inviting 14 parties to the Treaties of Locarno to join the U. S. in signing the covenant.

* * *

Judge **Douglas L. Edmonds,** youngest of the jurists now sitting in the Los Angeles County Superior Criminal Department, is assuming direction of the new "Master Calendar" system succeeding Judge **Elliot Craig.**

* * *

The Democratic National Convention assembles at Houston, Texas. **Claude G. Bowers,** newspaper man, is made Temporary Chairman and delivers the "keynote address." U. S. Senator **Joseph T. Robinson** of Arkansas is chosen Permanent Chairman. **Franklin D. Roosevelt** nominates Governor **Alfred E. Smith** of New York for President. Smith receives 849⅔ votes out of 1,100; 48 for Reed of Missouri; 48 for George of Georgia, 32 for Woollen of Indiana, and the rest scattered. The chairman, Senator Robinson, is nominated Vice President. In telegraphing acceptance of the nomination, Governor Smith says he personally favors a modification of the Volstead Law.

* * *

Efforts of California cities to pass ordinances making daylight saving effective by moving up the clock one hour are believed illegal on the ground that a city ordinance would conflict with office hours now in effect in State Offices which are fixed by act of the Legislature.

* * *

Speaking at the Judges' Club, Justice **John W. Shenk** of the California Supreme Court declares that some form of "leave to file suit" procedure must be developed to keep down or even control the enormous amount of litigation that continues to develop in the California courts. Justice Shenk states that the Supreme Court and Appellate Courts in California are so far behind in their work at this time that they cannot expect to catch up until 22 years hence. By that time it is expected that a balance can be maintained between the cases disposed of and the new work coming in. The only available relief, according to Justice Shenk, is to continue adding to the number of judges and to face a prospect eventually of a top-heavy organization. Presiding Judge **Victor R. McLucas** of the Superior Court introduced the other guests at the luncheon, including the members of the Supreme Court and State Bar Governors **W. J. Hunsaker, Frank James** and **Kemper Campbell.**

* * *

John Henry Mears and Captain **B. B. Collyer** travel around the world by steamship and airplane in 24 days.

LAST WILL AND TESTAMENT OF HERMAN OBERWEISS, OFFERED FOR PROBATE AT THE JUNE, 1934 TERM OF COUNTY COURT, ANDERSON COUNTY, TEXAS

I am writing of my will mineself and des lawyir want he should have to much money he ask to many answers about the famly. first think I want i dont want my brother oscar get a god dam thing i got he is a munser he done me out of forty dollars fourteen years since.

i want it that hilda my sister she gets the north sixtie akers of at where i am homing it now i bet she dont get that loafer husband of her to brake twentje akers next plowing the gonoph work. she cant have it if she lets oscar live on it i want i should have it back if she does.

tell moma that six hundret dollars she has been looking for for ten years is berried from the bakhouse behind about ten feet down she better let little frederick do the digging and count it when he comes up.

paster lucknitz can have three hundret dollars if he kisses the

book he wont preech no more dumhead talks about politiks. he should a roof put on the meetinghouse with and the elders should the bills look at.

moma should the rest get but i want it so that adolph should tell her what not she should do so no more slick irishers sell her vaken cleaners they noise like hell and a broom dont cost so much.

i want it that mine brother adolph be my exeter and i want it that the judge should please make adolph plenty bond put up and watch him like hell adolph is a good bisness man but only a dumkoph would trust him with a busted pfennig.

i want dam sure that schliemial oscar dont nothing got tell adolph he can have a hundret dollars if he prove judge oscar dont get nothing that dam sure fix oscar.

(signed) HERMAN OBERWEISS

BROTHERS-IN-LAW

(Continued from page 332)

Integration of the bar on a city-wide rather than a statewide basis is being studied by a committee of the **Philadelphia** Bar Association.

* * *

"The judge looks at the brief in his own time and in atmosphere of his own chambers. It will not be considered in the atmosphere of the courtroom, or in the presence of adverse counsel, or under the pressure of a time limitation. The judges look to the brief to supply the material, or references to it, with which to formulate a decision. A properly prepared brief will be so meticulously prepared, so complete, that the judge will be neither forced nor tempted to do his own research, either through the record for facts or through the library for cases. This function of the brief is too often forgotten."—E. Barrett Prettyman, United States Circuit Judge for the District of Columbia Circuit.

* * *

The Industrial Commission of **Ohio** has adopted rules of practice requiring representatives of claimants and employers, as a prerequisite to the right to appear before the Commission, to obtain annually a license from the Commission. The **Columbus** Bar Association has actively opposed the promulgation of the new rules. In a public statement it said:

> "We recognize the general right and duty of the Commission to adopt proper rules for the regulation of its

proceedings. We maintain, however, that no administrative board or agency such as the Industrial Commission can rightfully bar lawyers from representing their clients. Nor can any such board legally require a lawyer to obtain a license. If boards could do this the right to practice law throughout the entire State, as now conferred by the Supreme Court, would be severely curtailed."

* * *

"The enthusiastic response shown by Chicago and downstate law firms last year has prompted the Younger Members' section [of the **Illinois** State Bar Association] to again sponsor the Summer Apprenticeship Plan. Under the plan, law students are enabled to supplement their training with practical knowledge of office procedure, and law firms are able to solve the problem of vacation-depleted office staffs.

"Remuneration for an apprentice is a matter to be solved entirely between the parties involved. Last year's experience indicates that the prevalent wage was between $25.00 and $45.00 a week. In return for this modest sum, the lawyer can procure the enthusiastic services of a student. . . . Comments from firms who hired students last year indicate that they were found capable of doing legal research, utilizing digests, making preliminary drafts of pleadings, examining public records, interviewing witnesses and various other tasks not requiring direct supervision.

"A sub-committee of the Young Members' section will visit all Illinois law schools . . . to explain the plan to the students and obtain a list of those wishing to participate in the program. The sub-committee will act as a clearing house in filling requests for students from law firms."—*Illinois Bar Journal.*

* * *

Excerpts from "Confidentially for You, Mr. Attorney," a leaflet distributed by the **Wisconsin** Bar Association to its members:

Attorneys are so hypnotized by the term "public relations" that they overlook the obvious fact that it is only another name for what clients and the general public think of attorneys. It is no magic Hadacol that will cure the economic ills of the profession and fatten your pocketbook. Like a good reputation, good public relations cannot be bought but must be earned. No paid advertising, no press agentry and no public service program can substitute for a sound attorney-client relationship. . . .

Doctors are often judged as having a good or poor

"bedside manner." How are your "deskside manners"? Are you gruff and impatient or sympathetic and helpful? Remember, many of your clients are emotionally wrought up and worried or they wouldn't be there. Don't be evasive and non-committal. Be frank and as reassuring as circumstances permit. Don't be condescending. Try to talk the client's language. Don't begrudge a little time for pleasantries. It pays big dividends. . . .

You can't satisfy everybody, but generally speaking, never let a client go away dissatisfied. If you are unjustly accused, insist that another lawyer or the local bar association arbitrate to clear you and satisfy the client. Many grievances arise from misunderstandings, and for that there is little excuse. An aggrieved client—right or wrong—is usually a talkative one. Go out of your way to mollify him, else he damages your reputation and that of the entire bar. . . .

To the client, his case or problem is probably the most important thing on his mind. It may involve what to him is a lot of money. He and his family worry about it. Nothing adds fuel to these worries like being kept in the dark. Within reason, let him know what you are doing, what progress is being made, what the delays are and why. Send copies of letters, review the case with him, and in general let him know how much work you are doing. Remember, surveys indicate that the greatest public dissatisfaction with lawyers is that *they are so darned slow!* . . .

Do you worry because a few clients complain to you about high fees and let you know that they think you have over-reached? Don't let it worry you. It happens to others too, besides lawyers. Spend a morning behind the counter in a butcher shop, or at the checkout counter in a supermarket, and you will hear some real complaining. The fact is, a lot of people are chronic complainers on prices.

It seems to make it easier to pay the bill if they can gripe a little, jokingly or not, and they complain about the high cost of everything today—including lawyers' fees. . . .

Your case is closed, your client is happy, but you haven't been paid. Many pleasant client relationships go on the rocks at this point, due solely to unbusinesslike handling by the attorney. A great deal of unnecessary bad public relations grows out of long delayed billing of fees, unexplained fees, misunderstood charges or services and no discussion re payments. . . .

* * *

"IN 'DEFENSE' OF DISCIPLINE"

(Continued from page 316)

there is no sound reason for a lawyer to provoke ill feeling by undesirable conduct.

It is said, "The proposals (of the Los Angeles Bar) went too far and were too sweeping and all inclusive—they might well result in an impairment of the freedom and independence of the advocate. . . ." (State Bar Journal, Daily Journal).

ATTORNEY ENTITLED TO BE DISORDERLY?

What lawyer, may we ask, is entitled to resort to disorderly conduct in order to maintain his "freedom and independence" as an advocate? And, to add the obvious, a disorderly lawyer does his cause more harm than good anyhow.

As above quoted, the Board feels the proposals are "too sweeping and all inclusive." Both the Daily Journal report and the State Bar Journal fail to state that the Los Angeles Bar Committee *urged* the Board to draft an amendment of its own and that we would accept and support the amendment of the Board. That offer still stands.

The Board recognizes that the objectionable conduct sought to be controlled has resulted in "righteous indignation and criticism of the Bar from lawyers as well as laymen" (State Bar Journal), and "none (of the Board) condoned the sort of conduct" the Los Angeles Bar aims to control.

Since it is conceded that the public's indignation and criticism is righteous, and since the Board does not condone such conduct, what legitimate reason is there for "no action" by the Board?

It is pointed out that unless the State Bar takes an affirmative position, the proposal will not receive consideration in Sacramento—that it will receive serious consideration only if the State

Bar approves (State Bar Journal, p. 72). This is true—and is the reason why the Los Angeles Bar has persisted in its effort to gain the Board's approval.

As earlier mentioned, your Trustees voted to keep silent, but in light of the Board's articles, we trust there will not be even a raised eyebrow because the "defense" wanted to be heard too.

EYEING THE EVIDENCE

(Continued from page 318)

Clerk's office before the trial to inspect the will, and destroyed evidence by rubbing out the signature where it crossed over the vertical fold. Photographs had been made prior to this occurrence and the enlargements told the story. This incident suggests the importance of photographing disputed documents as a safeguard.

In re: *Estate of Charles E. Kreher* an attack was made on a genuine holographic will claiming the date was not all in the testator's handwriting. After a bitterly fought three weeks trial the jury came in with a verdict in favor of the contestants, although there was no expert testimony to support such a conclusion. The proponents had relied upon an extensive photographic demonstration of the handwriting to prove the will was all written, dated, and signed by the testator. However, this disregard of demonstrative evidence by the jury only resulted in the verdict being set aside, and that was the end of the contest.

Mark Twain was first to submit a typewritten manuscript to a publisher, and since that time typewriters have steadily grown in importance and so has the number of questioned typewritten documents. The usual problems are: (1) When was a document typed? (2) On what machine was it typed? (3) Was it all typed at the same time? (4) Who typed it?

But in the case of *Faries vs. McDowell* it was proved that an alleged typewritten document never existed. A witness for the plaintiff testified during the trial that she had typed certain "proposed plans of operation" for Mr. David Faries *after* the partnership of Faries & McDowell was in operation.

Later in the trial an expert demonstrated by photographic charts of typewriting comparisons that these proposed plans had actually been typed on a machine in Mr. McDowell's office long **before** he and Mr. Faries ever consummated a partnership. The court decided there had never been a partnership agreement.

INSPECTION OF ITALIAN DOCUMENT

Proving who typed a document in Rome, Italy, is a difficult if not impossible problem when the trial is in Los Angeles. However, this very thing was accomplished in the case of *Renato Senise vs. Hal Roach,* the moving picture producer. Senise sued Roach for $30,000. He claimed this amount was owed him for services rendered when Roach visited Italy for the purpose of producing famous operas in their natural settings. Roach had already paid him $5,000, but Senise's contract contained a clause, "and the sum of $30,000 to be paid at Los Angeles" and this was the basis of his lawsuit. Roach's copy of the contract did not have this very important provision. Both contracts were admittedly signed by Senise and Roach.

Senise claimed that his copy of the contract was typed especially for him by a secretary in Roach's suite at the Excelsior Hotel in Rome when Roach agreed to pay him $30,000 in addition to the $5,000 already paid. Roach remembered signing this extra copy, but said it was brought to him by Senise to sign as a duplicate of the original and that when he signed it there was absolutely no clause in it about any extra $30,000 to be paid in Los Angeles. So the problem was to determine whether the $30,000 clause was added and who had typed the document in Rome two years prior to the trial.

Senise further complicated matters by producing only a photostat of his contract, claiming Italian police had confiscated the original on the day of his departure for America. Nevertheless, enough discrepancies were found in the photostat to support a definite expert opinion and demonstration that the disputed clause had been inserted after Roach signed it.

In determining who typed the contract, the distance to Rome was overcome before the trial by locating three typewritten letters mailed by Senise from Italy to a local Hollywood jeweler. These letters were used at the trial to demonstrate Senise had typed the disputed copy of the contract on the same typewriter used to write the letters. Senise lost his case.

LETTER FORGED ON TOILET PAPER

In the recent trial of *People vs. Keller,* in which Mrs. Keller was tried in Los Angeles for the murder of her husband, an endearing letter, written on four sections of toilet paper, was purportedly in the handwriting of her husband and emphasized his love and affection for the defendant. Actually the defendant had manufac-

tured this letter as an alibi, and used bathroom stationery as a substitute for tracing paper so she could emulate her husband's handwriting by tracing a word at a time from letters he had actually written. She was convicted.

Many witnesses who claim they saw a check, note, deed or contract signed in their presence have been proven wrong in cases too numerous to mention.

Seven "eye witnesses" testified and identified Bud Garrett as endorsing and cashing three stolen American Express money orders in their Glendale stores. The defendant was acquitted on expert testimony to the effect that the endorsements differed from Garrett's handwriting, due to German handwriting characteristics in the endorsements, while Garrett's writing was typically American.

Three months after the trial a suspect named William Freedlander was apprehended and confessed to passing these checks and also $18,000 worth of other money orders. Freedlander cleared Garrett completely. When the two men were compared they looked no more alike than did their handwriting.

The *Monks Estate* case of San Diego eventually went to the

Supreme Court of the United States to test a California statute relating to mixed marriages between Caucasians and Negroes.

The wife of the testator introduced a prayer book to prove she was born in San Francisco, and not in the South, as was claimed by the opposition. On the inside back cover of this beautiful little book was a printed form which had been allegedly filled in by a priest who could not be located. It related all of the information about the birth and parents of the wife and substantiated her testimony.

Attorneys for the contestants requested an examination of this document, assuming something could be determined with reference to the age of the ink. What ultimately happened was the court consented, at the request of the expert, to remove the printed form from the back cover and thereby was revealed the publisher's name and date of printing. The date of printing was several years after the wife's alleged birth date.

The use of scientific equipment and processes including photography, ultraviolet light, microscopes, infrared, and chemical analysis very often discloses facts about a document to the degree of proof beyond a reasonable doubt. In *People vs. Weatherford* an infrared photograph was made of a pencil-written "release of premises" in the handwriting of the defendant, and signed by Mary A. Struck, the murdered victim. The photograph revealed invisible erased underwriting to verify this document as having been altered from an original bill of sale for a refrigerator sold by Mrs. Struck to Jackson Weatherford.

The District Court of Appeal, in confirming the conviction, included a photograph of this unusual infrared exhibit with the opinion. (178 P. 2d 816.)

Embezzlement, fraud and extortion cases are usually linked with false entries in book accounts, forged checks, and anonymous letters. The problem is to identify suspects with the documents for the purpose of recovering losses or to protect a victim's reputation. Federal and state officers worked for months to locate a "girl" named Louise Carter who was suspected of writing a series of extortion letters to a Hollywood celebrity. A handwriting expert gave officers the clue that the writer was not a girl, as assumed, but a man who was identified as Robert W. Major, a Los Angeles City school teacher. Major submitted his case on the preliminary hearing transcript and was found guilty of extortion.

In the final analysis, questioned document cases follow no specific pattern, but are varied as human nature itself. The only general rule to follow is to be document-minded and recognize the symptoms when they appear. Modern scientific means exist to discover the truth, provided a lawyer realizes when a document should be examined.

CHIEF JUDGE YANKWICH

(Continued from page 320)

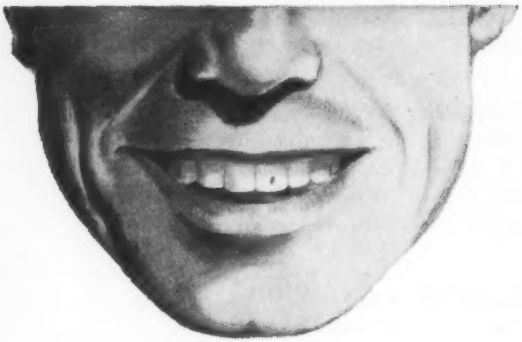
familiarize yourself with the law and the facts, no moral condemnation can be directed at you for the ensuing failure.

BOSWELL'S REPLY

There is a famous passage in Boswell's Life of Johnson which indicates the latitude which the competent and honest lawyer has in declining to prejudge a client's case according to abstract principles. Boswell asked Dr. Johnson "whether as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty." I give you Dr. Johnson's answer to that and the question which followed.

> Johnson: "Why no, sir, if you act properly. You are not to deceive your clients with false representation of your opinion; you are not to tell lies to a judge."
> Boswell: "But what do you think of supporting a cause which you know to be bad?"
> Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state the facts fairly; so that your thinking, or what you call knowing a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion." (Boswell's Life of Johnson, Everyman's ed., vol. I, p. 342.)

While Dr. Johnson, no doubt, spoke with "tongue in cheek," when he gave this reply, there is an element of truth in it. No one should take a cause which he does not believe in. For if you can not convince yourself, you will not be able to convince a judge. That is the general attitude of lawyers who are compelled to reject a cause their client believes is fair and just. And it is the only honorable attitude. The fact that some other lawyer, either on the



Naturally, YOU are the one we want to please!

Why? Because we believe that you, as an attorney, want your client to benefit from the best possible service in the management of his trust or estate. By pleasing you, we cannot fail to satisfy your client. We also try to relieve you of all burdensome tasks, but welcome your advice and participation when problems arise with which you are familiar.

Dynamic Trust Management

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NATIONAL TRUST AND SAVINGS ASSOCIATION

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

basis of full or faulty disclosure, might reach a different conclusion should not influence one in taking a cause which does not seem to him legal or just.

Perhaps the most difficult problem is presented by the sudden emergence in a law suit of a fact that seemingly destroys the entire structure of your case. What is one to do in the circumstances? Lawyers have been known to abandon the cause of the client or to confess judgment. Neither is difficult to do. But either may result in injustice. A safer procedure, from a professional standpoint, is to try to salvage the cause. This requires quick thinking and adjustment to the new situation.

SURPRISES IN TRIALS

I may be permitted to cite two instances in my own experience. Years ago I was suing a motion picture distributing company for an alleged breach of contract concerning the distribution of certain motion pictures. After the President of the Company, himself a lawyer, had taken the stand, our adversary produced a writing entirely in handwriting of the witness in which he apparently authorized the doing of the very things of which we complained in the law suit. My associate in the case was a very distinguished lawyer, now dead, Arthur Wright. When this happened, he turned to me and said: "I have no heart to continue." We called a conference very quickly. We decided that this one piece of evidence which our client had forgotten all about, while damaging our case, was not fatal to it. We continued the trial, ultimately securing not the judgment we sought, but something which warranted our faith in the client's cause.

Another incident occurred in a case I tried when a Judge of the Superior Court. A real estate broker had sued a property owner for a commission alleged to be due for negotiating a deal by which certain financial interests agreed to construct a building upon a business lot which the defendant owned. Both the plaintiff and defendant were represented by men of high standing; in fact, men who had both served long and well in the office of the City Attorney of Los Angeles. One of the conditions of the deal was that upon the execution of the contract, a bonus of $10,000.00 was to be paid to the defendant, as the owner of the property. The execution of the contract was proved. The broker testified that he tendered a Cashier's Check for $10,000.00 to the defendant, who declined to accept it. The defendant took the stand and stated

that the tender was not made. The end of the judicial day was nearing. The case was not to be argued until the following day. And then, through one of these "hunches" which Judges have and which lawyers dread, I suggested that there probably would be a bank record of a Cashier's Check in such amount. I suggested to counsel for the plaintiff that the bank's records be searched. The following day when I reached my chambers, the attorneys were waiting. I was informed by the attorney for the plaintiff that his client had been mistaken, that he had tendered a *personal* check. I continued the matter until the afternoon with the statement that I would be very glad to see the personal check but I shall also want to see the stub. I wanted to make sure that the stub was in the right place in the check book. But, to make a long story short, the check was never produced. Nevertheless, the lawyer for the plaintiff argued with what, to me, was apparent honesty and sincerity, that, under one interpretation of the contract, the promise to pay the $10,000.00 was not a condition *precedent* to the consummation of the deal. He argued the undertaking was complete when the contract was entered into and that the failure to pay the amount would merely give rise to an action for debt and did not justify the repudiation of the contract. I did not agree with this legal argument and found against the plaintiff. But to the present day, while realizing the difficult position in which the client had placed the attorney, I am satisfied that all things considered, it was better for him to attempt to shift his theory of liability than to abandon the case in what the client would certainly have considered a betrayal.

So your path in choosing what appears to you as legal or just is not easy. But if you will bear in mind human frailties, if, as lawyers, you will consider yourselves not participants in a game but as helping in a great social task—that of achieving justice under law—peace through legal controversy—I am quite certain that you can perform your duty honorably and in strict conformity with the highest ethics of the profession and of the community. But I also assure you that this will not prevent the satirists and persons whose business ethics may be of the most questionable kind, from deprecating, as Boswell did in the same colloquy, your action in "affecting a warmth when you have no warrant."

For there are always those who, like Jack Cade, believe that the first desideratum of all reform is "To kill all the lawyers."

MEMO: FOR BUSY ATTORNEYS!

DECADES OF EXPERIENCE as a professional—not an amateur—executor, make it possible for us to dispose of business details of estate administration without encroaching on the time of the estate lawyer. ¶ We shall welcome an opportunity to be associated with you on this basis, in the efficient settlement of your clients' estates. Call Lewis B. Maier—MA 6-8441 (without obligation, of course).

UNION BANK & TRUST CO. *of Los Angeles*

THE BANK OF PERSONAL SERVICE • EIGHTH & HILL STREETS • WE HAVE NO BRANCHES
MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION & FEDERAL RESERVE SYSTEM

AWARD OF PROPERTY

(Continued from page 322)

determines that a divorce ought to be granted; but in such interlocutory judgment the trial court should not attempt to make a final disposition of the property; that at the time of the dissolution of the marriage, and at that time only, the property should be assigned to the respective parties pursuant to the determination made by the court at the time of trial. In the Remley case the court wisely pointed out that a final decree of divorce may not be entered after reconciliation of the parties within the one-year period following entry of the interlocutory and that so long as the court may refuse to enter the final decree, if intervening conditions justify such refusal, its determination, as evidenced by its interlocutory judgment, should be in the fullest sense *interlocutory,* so that at any time during the pendency of the action substantial justice may be done the parties no matter what the eventuality. The interlocutory judgment is not a decree of divorce. It does not dissolve the marriage, and it is the holding of the cases last cited above that the court SHOULD NOT assign or dispose of the community property until such time as the marriage is absolutely dissolved by the final decree of divorce.

Even in the Leupe decision, first above referred to, the court sounded the warning that the conclusion it reached on the finality of a property award, where no timely appeal is taken from the interlocutory decree, was not to be considered determinative in a case where there is a reconcilation before the final decree, preferring to reserve judgment on the problems thus raised until the issue would be presented directly.

In the case of *Wilson vs. Wilson,* 76 Cal. App. 2d, 119, 132, the Appellate Court found itself "faced with the problem expressly left open in the Leupe case." Unlike the Leupe case, the appeal in the Wilson case was from the interlocutory decree. In its decision the court cited the Remley and Strupelle cases holding that it constituted error to make a present and absolute disposition in the interlocutory. The court further stated: "It would appear that a proper solution of this problem would be to hold that the interlocutory may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree. A reconciliation before

that time or the death of one of the parties, and perhaps other circumstances, would prevent the conditional title from becoming absolute. However, in view of the confusion in the cases it would appear that the Supreme Court or the Legislature are the only bodies that can finally settle this troublesome problem. In the present case it was, of course, proper for the trial court to determine in its interlocutory the status of the property and how it ought to be assigned upon the entering of the final decree. Justice will best be served by striking from the decree all words presently disposing of the community property and inserting words to the effect that in the final decree the parties are entitled to have assigned to the parties specified the portions of the community property enumerated in the decree."

We note that the Supreme Court has granted a hearing in the case of *Gudelj vs. Gudelj,* 114 ACA 70, in which the question has been squarely raised and therefore, we may expect that the present confusion in the decisions will be eliminated.

The basic philosophy in the interlocutory decree as intended by the Legislature, was clearly stated by our Supreme Court in the early case of the *Estate of Dargie,* 162 Cal. 51, 53, wherein the court referred to sections 131 and 132 of the Civil Code and held that the entry of the final judgment contemplates further judicial action and not merely a ministerial or clerical act, and that unless the court so acts in every case there is no authority for the entry of any final judgment. It is the final judgment that grants the divorce. The interlocutory judgment merely declares the right to a divorce. It is the final judgment that dissolves the marriage. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it. In the meantime, the parties remain in the legal relationship of husband and wife.

The interlocutory decree was intended to afford the husband and wife a cooling off period wherein the parties might well be able to resolve their difficulties and to effect a reconciliation. The Supreme Court stated in *Brown vs. Brown,* 170 Cal. 1, 3, the "delay of one year before the entry of a final decree was intended to operate as a method of prolonging the action, so as to prevent the divorce from being hastily accomplished, - - -." The making of a final disposition of the community property or the homestead

at the time of the interlocutory is a step, generally speaking, which makes a subsequent reconciliation more difficult and is, therefore, against the established legislative policy of this state.

While a discussion of the social effects of these problems is not entirely relevant in this brief comment on one phase of the law, the staggering statistics pertaining to broken homes and their effect upon the unfortunate children of such marriages lead us to conclude that no obstacle should be placed in, or bridges burned along, the uphill path to reconciliation. More than one-half the marriages in our own County of Los Angeles end in the divorce courts and last year, it is reported there were approximately 29,500 divorce cases filed in this County alone as against 30,000 marriage licenses issued during the same period. These are alarming and tragic figures.

TAX HAZARDS

(Continued from page 324)

to a disinterested trustee to distribute principal to the widow is clearly not such a general power. But suppose the widow is named as a co-trustee. In that case the Committee report makes it clear that her status as a fiduciary and the joint responsibility of the other trustee will not prevent the trust from being taxable on her death.

To avoid this result it is necessary to restrict the power of invasion so that, in the language of Sec. 811(f)(3)(A), it "is limited by an ascertainable standard relating to the health, education, support, or maintenance" of the widow.[1] Nothing in the statute or the Committee report explains what is meant by such an "ascertainable standard." Presumably what was intended was an external standard of the type which permits an estate tax deduction to be taken for a charitable remainder, despite the fact that the corpus is subject to invasion for the benefit of the life tenant. If the attorney is willing to take a chance on the Commissioner's acceptance of this trust, he must then carefully study the trust indentures and surrounding circumstances which were considered, with varying results, in *Ithaca Trust Co. v. U.S.*, 279 U.S. 151, 73 L.Ed. 647, *Merchants National Bank of Boston v. Commissioner,* 320 U.S. 256, 88 L.Ed. 35, *Henslee v. Union*

[1]Unless, of course, the testator is satisfied to subject her to the monetary restriction set forth in Sec. 811(f)(5).

Planters National Bank, 335 U.S. 595, 93 L.Ed. 259, and a host of decisions of lesser courts, in the hope of finding a safe formula for satisfying the new statutory requirement.

A "REVERSE" GENERAL POWER

If the power to appropriate principal for the widow's benefit is placed entirely within the uncontrolled discretion of a corporate or other disinterested trustee, the problem is, of course, avoided; but all too frequently, in an attempt to save fees, the testator prefers to select as trustee one or more of those named to receive the trust estate on the widow's death. This raises the difficult question of whether the trustee has not been given a "reverse" general power—that is, a power to benefit himself by *not* distributing principal to the widow. Of course, if he exercises the express power by distributing principal to the widow, he is making a gift to her of his remainder interest therein. Such a gift is taxable even if the express power of appointment is sufficiently related to an ascertainable standard to qualify as exempt. This is made clear by the statement in the Senate Finance Committee's Report reading as follows:

"The provisions relating specifically to powers of ap-

> pointment, which are proposed to be inserted in the Internal Revenue Code by this bill, are not intended to limit the scope of other subdivisions of the code (such as sub-secs. (a), (c), and (d) of Sec. 811 and sub-sec. (a) of Sec. 1000) which apply to the transfer at death or during life of any interest in property possessed by the taxpayer."

The more serious problem, however, is whether the corpus of the trust can be included in the trustee's estate if he predeceases the widow. It may then be argued that his power to benefit himself by not exercising the express power in favor of the widow—that is, by inaction—constituted a general power of appointment, the mere possession of which requires the inclusion of the trust property in his own taxable estate.

It is possible, of course, that the Commissioner's regulations interpreting the 1951 Act, when finally published, will disavow all recognition of such "reverse" powers. We can hope so; but until that happy day arrives, it would seem that the prudent course would be to grant express powers of appointment only to truly disinterested trustees.

OPINION ON LEGAL ETHICS

(Continued from page 326)

Canon 12 contemplates that a lawyer's fee will not exceed the value of services rendered. This Canon requires that the fees should be determined according to the circumstances of each case.

Canon 22 requires that the conduct of the lawyer with other lawyers should be characterized by candor and fairness. In his dealings with B, A appears to have acted within the spirit of Canon 22 requiring "candor and fairness." As heretofore stated, the agreement between A and B providing for a division of fees is not, in the opinion of the Committee, a violation of professional ethics providing A maintained supervision or control over B, or otherwise performed a service for the client in this matter.

Question No. 2—Is such an agreement contrary to public policy?

Question No. 3—Would such an agreement be enforceable in law?

The answers to questions No. 2 and No. 3 both require expressions of opinion on questions of law. Such opinions are not within the functions of this Committee. (A.B.A. Opinion 63.)

This opinion, like all other opinions of this Committee is advisory only. (By-Laws, Article VIII, Section 3.)

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